To Be Submitted

No. 108457

NEW YORK STATE SUPREME COURT

APPELLATE DIVISION - THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

AD No. 108457

MICHAEL J. DEGNAN,

Defendant-Appellant.

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Appellant Michael Degnan was charged with multiple felonies arising from an alleged rape of a teenage girl (for which the jury either acquitted him or could not reach a verdict) as well as other crimes committed as a fugitive, including burglary, grand larceny, and several petit larcenies. Following a jury trial, the jury convicted him of Burglary in the Second Degree and four misdemeanors,[1]

Unlawful entry and unlawful remaining are mutually exclusive theories that establish the requisite element of criminal trespass. Unlawful entry is accomplished when a person enters premises that are closed to the public, without the consent of the owner or another authorized individual. In contrast, to be guilty of burglary for unlawful remaining, a defendant must have entered lawfully but then remained for the purpose of committing a crime after he is no longer authorized to be on the premises. *Gaines*, 74 NY2d at 363. In addition, in order to be convicted of burglary, a defendant must unlawfully enter a building or dwelling with a contemporaneous intent to commit a crime therein.

The People's theory of the case, as articulated in the prosecutor's summation, was that Mr. Degnan had unlawfully entered the residence at 237 Tunnel Road on June 16th while he had been a

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[1]These convictions involved one count of Endangering the Welfare of a Child and three counts of Petit Larceny.

fugitive after having sexually assaulted a minor at 165 Pleasant Hill Road, on June 9th. Under this theory, Mr. Degnan had entered the structure in order to evade the police and, while temporarily hiding out there, had formed an intent to steal several distinctively marked shirts. On appeal, Mr. Degnan avers that the trial judge gave an erroneous jury instruction as to burglary in the second degree that invited the jurors to improperly convict him based on a larcenous intent formed sometime after he had been residing at the premises.

During jury deliberations, the trial judge received a note from the jury asking:

> "Does a dwelling mean the owner would return that night?"

A. 108, 112. During a discussion about how to respond, Mr. Degnan asked the judge to reread the statutory definition, while the prosecutor asked him to reread his previous expanded definition of dwelling or the burglary instruction *in toto*. The judge chose to reread his previous instruction but to include various examples to illustrate "the nature of the structure," specifically citing a house, a tentm an office or a car. A "dwelling" is defined as "a shelter (such as a *house*) in which people live" or "[a] *house*, flat, or other place of residence." Moreover, a detective had described at 237 Tunnel Road as a "single-family residence." As a result, by using the words "house" and "residence" as examples of a "dwelling", Judge Burns was, in effect, improperly making a

judicial finding and usurping the jury's role. In sum, the judge failed to respond meaningfully to the jury's inquiry about the meaning of the term "dwelling."

Finally, because the People's theory of the case posited that the defendant had entered the residence at 237 Tunnel Road after fleeing from the scene of the alleged sexual assault, for the purpose of evading the police, and had formed an intent to steal certain items of clothing only after remaining in the dwelling to avoid capture, the People failed to adduce sufficient evidence to convict Mr. Degman of burglary in the second degree.

QUESTIONS PRESENTED

In the opinion of appellant, the following questions are presented:

I. Whether, the trial judge incorrectly charged the jury regarding the elements of burglary in the second degree when, in the absence of evidence that the defendant had had permission to enter 237 tunnel road, he had included "remains unlawfully" language and had failed to clearly instruct that the jury must find that the defendant had intended to commit a crime at the time of his unlawful entry;

II. Whether, where the trial judge received a jury note that asked: "Does a dwelling mean the owner would return that night?", the judge failed to provide a meaningful response by repeating parts of his original charge but, by offering illustrative examples that parroted dictionary definitions of a "dwelling," usurped the function of the jury by implicitly directing a finding;

III. Whether, where the People's theory of the case proposed that the defendant had illegally entered 237 Tunnel Road after the alleged sexual assault in order to evade the police, and only afterwards formed an intent to steal certain items of clothing, the People failed to adduce sufficient evidence to convict the defendant of burglary in the second degree.

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION - THIRD DEPARTMENT

No. #108457

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff/Respondent,

-versus-

MICHAEL DEGNAN,

Defendant/Appellant.

APPEAL FROM THE COUNTY COURT
COUNTY OF SCHENECTADY

BRIEF FOR APPELLANT_

STATEMENT OF THE CASE

Appellant Michael Degnan was charged with multiple felonies arising from an alleged sexual assault committed at 165 Pleasant Hill Road, as well as a burglary of a residence at 237 Tunnel Road, and related thefts, all committed in Broome County, State of New York, in June of 2013.[1] Following a jury trial before the Hon.

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[1]The Broome County indictment, filed on September 20, 2013, charged Mr. Degnan with Rape in the First degree, Penal Law 130.35[1], Class B felony; one count of Rape in the Second Degree in violation of *Penal Law* 130.30[1], a Class D felony, two counts of Criminal Sexual Act in the First Degree in violation of *Penal Law* 130.50[1], a Class B felony, two counts of Criminal Sexual Act in the Second Degree in violation of *Penal Law* 130.45[1], a Class D felony, one count of Endangering the Welfare of a Child, *Penal Law* 260.10[1], a Class A Misdemeanor, with one count of Burglary in the Second Degree, *Penal Law* 140.25[2], a Class C Felony, one count of Criminal Trespass in the Second Degree, *Penal Law* 140.15, a Class A misdemeanor, two counts of Grand Larceny in the Fourth Degree, Penal Law 155.30[8], a Class E Felony, and three counts of

Brian D. Burns, Acting Broome County Court Judge,[2] the jury acquitted Mr. Degnan of both counts of Criminal Sexual Act in the Second Degree, convicted him of Burglary in the Second Degree and four misdemeanor counts,[3] and deadlocked on the remaining two counts.[4]

In a written order, filed on April 1, 2016, Judge Burns denied Mr. Degnan's post-verdict motion to set aside the verdict pursuant to CPL 330.30. A. 5. On the same day, the judge found that Mr. Degnan was a persistent violent felony offender and sentenced him to a term of incarceration of 24 years to life. A. 16, 46. He also ordered him to provide a DNA sample, imposed a crime victim assistance fee of $375, a surcharge and a DNA collection fee. Mr. Degnan filed a timely notice of appeal. A. 1.

Petit Larceny, *Penal Law* 155.25, Class A misdemeanor. A. 125-138.

[2]The Honorable Martin E. Smith, Broome County Court Judge, had presided over the defendant's case since the arraignment on October 9, 2013, including all pretrial motions. However, having reached the mandatory retirement age as of January 1, 2016, Judge Smith was compelled to withdraw from the defendant's case and was succeeded by Judge Burns, who presided over Mr. Degnan's trial and sentencing.

[3]One count of Endangering the Welfare of a Child and three counts of Petit Larceny.

[4]e jury deadlocked as to Rape in the Second Degree and Grand Larceny in the Fourth Degree.

STATEMENT OF FACTS

The Alleged Sexual Assault

On June 9, 2013, Julia Wood and her friend Kaylie Smith had spent the night together at Kaylie's home at 165 Pleasant Hill Avenue in Port Crane, Broome County. Later that evening, after Julia and Michael Degnan had exchanged a series of text messages, the defendant had allegedly sexually assaulted her while they were alone in the living room.[5] At about 3:30 a.m., Julia had sent two text messages to a friend in Afton: "I need help" and "Kayli's stepdad raped [me]."[6] A. 52, 57-58. After being awakened by her daughter Haley who said Julia was in trouble, Michelle Woodward notified Julia's parents about the alleged assault. The parents arrived at 165 Pleasant Hill within 15 minutes and retrieved their daughter. After calling 911, they received instructions to leave the scene and await the police. *Id.* Kayli and her mother remained in the living room of their home while Mr. Degnan walked away on foot. A. 59. Mr. Degnan, who represented himself at trial, admitted to "remov[inh] himself" from the scene and using a key to later enter 237 Tunnel Road. A. 97.

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[5]Kaylie and her mother, Shawnta Smith, had gone to bed in separate upstairs bedrooms, while Shawnta's boyfriend, Mr. Degnan, had remained downstairs.

[6]Haley and Brianna had spent the day together camping in Afton. A. 49.

The People's Burglary Evidence

During a visit to his mother's residence at 237 Tunnel Road in Port Crane on June 16th, Stephen Terry had noticed that the lock on the shed had recently been broken off and some items of personal property disturbed. A. 66-67. Mr. Terry testified that the residence had belonged to his mother, Ms. Hazel Terry, who was living in Naples, Florida. A. 61. When his mother would return to Broome County, she would stay at that location.[7] *Id.* Ms. Terry had put her son in charge of maintaining the property, including giving him the authority to grant or deny permission to enter or stay at the property.[8] A. 62. Terry described the Tunnel Road residence as "fully furnished" with operating utilities, including water and electricity.[9] *Id.* On June 16th, there was no one

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[7]Mr. Terry said his mother would treat her New York residence as a "summer house" and would stay there for a week or two or three months. A. 79b. She had not lived there full-time for about six years. *Id.*

[8]Mr. Terry testified that he did not know the defendant and had not given him permission to enter or to remain at 237 Tunnel Road, or to take any of Terry's clothing from that location. A. 64, 77.

[9]Terry testified that there was furniture in the living room, a stove and refrigerator in the kitchen area, two main bedrooms, and a small office bedroom. A. 63. His mother's bedroom contained a queen-size bed, mattress, and dressers. *Id.* Both Mr. Terry and his mother stored clothes at that location. A. 64. In particular, he had stored shirts, bearing his company's logo "Stadium International" at that location. A. 74. He also stored a tan shirt with a flight combat insignia that he had purchased at Miramar, a military base in San Diego, prior to June of 2013. A. 75-76.

residing there. A. 65.

After entering the residence, Mr. Terry observed a coffee mug on a living room table that he picked up and put on the kitchen counter.[10] A. 70-71, 73. He found dirty dishes in the kitchen sink and items of food in the refrigerator. A. 68-69. He went upstairs and, because the lights had been turned off, used his cellphone flashlight to see into his mother's bedroom.[11] *Id.* He observed a sleeping bag laid out on his mother's bed, clothes strewn on the floor, and toiletries on the dresser, all items that he had not seen two or three weeks earlier during his last visit. A. 60, 65, 70. One day later, after verifying that none of his friends had recently inhabited his mother's home, Mr. Terry called the Sheriff's Department. A. 71-72.

In the fall of 2014, Mr. Terry had been getting the residence ready for sale. A. 77b. He testified that he had boxed up all of his mother's personal possessions and had moved them to another location. *Id.* At that time, his mother had been present for the the sale. *Id.* During this process, Mr. Terry had found an iPhone in his mother's closet that was laying on a box. A. 78. When he had charged the cellphone, Mr. Terry noticed a woman's face on

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[10]Terry described the mug as "kind of religious, Christmasy." A. 70.

[11]Terry testified that, since he had last visited the house two or three weeks before, the light bulbs had been unscrewed. A. 67.

the phone's screen. *Id.* After making some inquiries of family members, he contacted law enforcement and turned the phone over to a detective. A. 79. At that time, the police showed him his Stadium shirt and Terry identified his Miramar shirt from the defendant's booking photo. *Id.*

John Harder, a detective for the Broome County Sheriff's Office, had responded to 237 Tunnel Road. A. 82. Detective Harder described the structure as a single-family residence located in a rural setting with running water and electricity. Tr. 82-83. He testified that Stephen Terry had served as the caretaker of the property for his mother, the house's owner, who resided in Florida. A. 80-81, 83. The building had a full living space on the top floor. *Id.* Harder was shown photos of the interior and identified a furnished living room, a kitchen with a refrigerator and microwave stove, a den, and two bedrooms. A. 84-86. An open sleeping bag was depicted on one of the beds and there were clothes in the closets. A. 86. He also described a storage area in the basement. A. 87.

Detective Harder recovered a coffee mug from the kitchen that was processed for fingerprints and DNA evidence. A. 87-88. On June 20, 2013, Harder became aware that the the New York State Police had taken the defendant into custody at the Del Motel. A. 89. During the execution of a search warrant, the police had recovered a Stadium International jacket and an Ely Park jacket in

the room with Mr. Degnan. *Id.* On June 26th, Detective Harder executed a search warrant at the Broome County jail had seized a tan-colored T-shirt and a pair of Nike sneakers. A. 90. Mr. Terry had identified the tan shirt from Mr. Degnan's booking photo which had appeared in the news. A. 90. In August of 2014, the detective received a cellphone that Terry had found at 237 Tunnel Road, which had a picture of a young woman laying in bed with a dog on the screen. A. 92. Harder contacted Shawnta Smith to assist in identifying the phone. *Id.*

The Defendant's Admissions

Mr. Degnan represented himself during the criminal trial, examining witnesses, making trial objections, and giving a closing argument. During his summation, he admitted to having entered 237 Tunnel Hill Road by using a key and once inside having taken a T-shirt.

> But in the vein of being real with you . . . did Michael Degnan enter 237 Tunnel Hill Road? Absolutely. Yes. Yes, he did.

A. 97. He denied "evading" law enforcement but characterized his flight from 165 Pleasant Hill as having momentarily "remov[ing] [him]self" from the police.

> Was he somehow *evading* law enforcement? Absolutely not.
>
> So, maybe I was justified *to remove myself for the moment*.

A. 97-98 (emphasis supplied). Mr. Degnan denied that he had had

any criminal intent when he had entered a vacant house, using a key to enter.

> And was there some criminal intent involved when I went to a vacant house, which I had viewed a few months prior? Was there criminal intent in that? . . . So, I specifically went there for a reason.
>
> . . . of all the places I could have gone, you know, I stole this guy's truck, I could have gone anywhere. No, I went there.
>
> . . . Did he bust a window and break in the place and commit all these crimes? No. He used a key and went in.

A. 99-101.

> Finally, Mr. Degnan admitted to having stolen a T-shirt.
>
> Oh, wait, forgot, I took a T-shirt. I took a T-shirt. That was my intention of going all those miles, to go and get a T-shirt. I mean, this is what it boils down to.

A. 101.

ARGUMENT

I. THE TRIAL JUDGE INCORRECTLY CHARGED THE JURY REGARDING THE ELEMENTS OF BURGLARY IN THE SECOND DEGREE WHEN, IN THE ABSENCE OF EVIDENCE THAT THE DEFENDANT HAD HAD PERMISSION TO ENTER 237 TUNNEL ROAD, HE HAD INCLUDED "REMAINS UNLAWFULLY" LANGUAGE AND HAD FAILED TO CLEARLY INSTRUCT THAT THE JURY MUST FIND THAT THE DEFENDANT HAD INTENDED TO COMMIT A CRIME AT THE TIME OF HIS UNLAWFUL ENTRY

Mr. Degnan avers that, under the facts of this case, the trial judge had clearly erred by giving the jury an instruction for burglary in the second degree that included "remains unlawfully" language and had failed to plainly state that the jury must find that the defendant had intended to commit a crime at the time of his unlawful entry.

The Initial Burglary Charge

The trial judge gave the following initial instruction as to the elements of burglary in the second degree, which was later augmented to explain the definition of a "dwelling."

> Under our law, a person is guilty of burglary in the second degree when that person *knowingly enters or remains unlawfully in a building with the intent to commit a crime therein* and when the building is a dwelling.
>
> * * *
>
> A person *enters or remains unlawfully in a building* when that person has no license or privilege to enter or remain in the building. To have no license or privilege to enter or remain mans to have no right to do so. A person *knowingly enters or remains unlawfully in a building when they are aware that they*

are doing so without license or privilege to do so.

Intent means their conscious objective or purpose. Thus, a person *has an intent to commit crime in a building when that person's conscious objective or purpose is to commit a crime in the building*

The crime of burglary is separate and distinct from any crime that a person may commit within the building. The crime of burglary is complete when a person knowingly *enters or remains in a building unlawfully and does so with the intent to commit a crime in the building*, regardless of whether that person commits, or even attempts to commit, any specific crime in the building.

In order for you to find the defendant guilty of this crime, the People are required to prove from all the evidence in the case beyond a reasonable doubt that on or between June 9th and June 16, 2013, in Broome County, New York unlawfully remained at a building located at 237 Tunnel Road, Town of Fenton, and that he did so knowingly, that *he did enter or remained unlawfully, with an intent to commit a crime therein and that the building was a dwelling.*

A. 105-107 (emphasis supplied).

Under current New York law,[12] a person is guilty of burglary

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[12]At common law, burglary was defined "as the breaking and entering of a dwelling of another, at night, with intent to commit a felony therein." *People v. Gaines*, 74 NY2d 358, 361 [1989] (quoting Hechtman, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law art 140, at 5 [1975].) Unless the intent to commit a felony existed at the time of the breaking and entry, there was no burglary. *Gaines, supra* at 361. Similarly, under the former Penal Law, a defendant who broke and entered with no intent to commit a crime was not guilty of burglary, though later deciding to commit a crime on the premises. *Id.* (citing *People v Haupt*, 247 NY 369, 371 [1928]).

in the second degree when he "knowingly enters or remains unlawfully" in a building or "dwelling" with intent to commit "a crime" therein. Penal Law 140.20; 140.25[2]. "[U]nlawful entry and unlawful remaining are mutually exclusive theories that establish the requisite element of criminal trespass."[13] Unlawful entry is accomplished when a person enters premises that are closed to the public, without the consent of the owner or another authorized individual. See Penal Law 140.00[5] ("A person 'enters or remains unlawfully' in or upon premises when he is not licensed or privileged to do so"). *People v. Graves*, 76 NY2d 16 [1990] (noting that a person lawfully enters premises that are not open to the public when he obtains consent from the "the owner or another whose relationship to the premises gives him authority to issue such consent"). In contrast, to be guilty of burglary for unlawful remaining, a defendant must have entered lawfully but then remained for the purpose of committing a crime after he is no longer authorized to be on the premises. *Gaines*, 74 NY2d at 363.

In order to be convicted of burglary, a defendant must unlawfully enter a building or dwelling with a contemporaneous intent to commit a crime therein. *Id.* at 363 [1989]. Thus, the Court of Appeals has held that

> [i]n order to be guilty of burglary for unlawful remaining, a defendant must have entered legally, but remain for the purpose

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[13]*Winkfield v. Duncan*, 2013 U.S. Dist. LEXIS 27423, 29 [EDNY 2013] [citing *Gaines*, 74 NY2d at 363).

> of committing a crime after authorization to be on the premises terminates. And in order to be guilty of burglary for unlawful entry, a defendant must have had the intent to commit a crime at the time of entry. *In either event, contemporaneous intent is required.*

Id. at 363 (emphasis supplied) (footnote omitted).[14] See also *People v Cubino,* 50 AD3d 312 [1st Dept 2008] ("Although the People need not specify what crime a defendant intended to commit, in order to elevate criminal trespass to a burglary, the proof must show a defendant intended to commit some other crime contemporaneous with the trespass") (citation omitted); *Winkfield v Duncan, supra* at note 9 ("In *People v Gaines,* the New York Court of Appeals held that . . . to be guilty of burglary, a defendant must harbor the intent to commit a crime (other than the crime of trespass) *at the same time* that he commits the criminal trespass.") (citing *Gaines,* 74 NY2d at 363) (emphasis in original).

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[14]See *United States v Bernel-Aveja,* 844 F3d 206, 231-238 [5th Cir 2016] (Owen, J. concurring) (comprehensive state-by-state analysis of timing of intent in state burglary statutes to address defendant's claim that his Ohio state conviction for burglary did not qualify as a "burglary of a dwelling," a specifically enumerated "crime of violence" under United States Sentencing Guideline 2L1.2). A majority of states have adopted unlawful "remaining in" statutes while a minority have only unlawful entry offenses. 844 F3d at 231. New York is one of three states that have unlawful entry or 'remaining in' statutes that "appear to have been construed to set forth two divisible offenses and, *when only unlawful entry is charged, to require intent at the time of unlawful entry.*" *Id.* at 234 (emphasis supplied). It is also one of six states that "appear to require intent to commit a crime at the time that the defendant's presence on the property first becomes unlawful." *Id.* at 238.

From the evidence adduced at Mr. Degnan's trial, a reaasonble jury could have found that Mr. Degnan had initially entered the Tunnel Road residence to hide from the police, after he had fled from 165 Pleasant Hill Road.[15] Moreover, based on the sleeping bag spread out on Ms. Terry's bed, the dirty dishes sitting in the kitchen sink, and the coffee mug found, the jury could have also inferred that Mr. Degnan had temporarily hidden out at that location.[16] A. 1020-1021. Accordingly, a jury could have concluded that, although the defendant had unlawfully entered 237 Tunnel Road, he had not harbored a contemporaneous intent to commit a crime, but merely had intended to evade the police. In sum, the court's erroneous jury instruction invited the jurors to improperly convict Mr. Degnan of burglary in the second degree based on a larcenous intent formed sometime after he had been residing at the premises. See *Gaines, infra*.

Preservation of Gaines's Instruction Error

Mr. Degnan has preserved his right to challenge the correctness of this instruction because, during a charge conference relating to the definition of a "dwelling," Judge Burns had prematurely cut off the defendant when he had sought clarification of the People's theory of the case - whether or not he was being charged for unlawfully entering 237 Tunnel Road or for unlawfully

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[15] *Infra* at 30.

[16] Robert Orzelek's F-350 truck had been stolen from the garage at 247 Tunnel Road on June 14th.

remaining there."[17] A. 96. The trial judge's interference had precluded Mr. Degnan from noting his objection that the People's disparate theories of the case were necessarily mutually exclusive and that the accused must have formed his criminal intent at the moment of his unlawful entry. That the defendant would have articulated these arguments had he been permitted to proceed is not mere speculation. In fact he had voiced both legal arguments

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[17]The relevant colloquy appears below:

> THE COURT:
>
> Turning to the charge conference, starting with Mr. Degnan, did you have the opportunity to review the People's request for those two additional charges last night?
>
> THE DEFENDANT: I did, Your Honor.
>
> * * *
>
> THE DEFENDANT: Within my omnibus motion I requested specification via a Bill of Particulars on *what form of burglary they were actually presenting* I've received no clarification.
>
> . . . I mean, *are they presenting that [I] entered this residence or did I remain in the residence?*
>
> THE COURT: Okay. Let me be more specific. A dwelling. That's the charge that I'm speaking of, not about what their theory of the case is . . . The people have asked me to slightly expand on that and give a further definition of dwelling.
>
> On that issue do you object or consent?
>
> THE DEFENDANT: *No, I object to that, as well,* Your Honor.

A. 95-96 (emphasis supplied).

during his pretrial filings.[18]

After the judge had clarified what legal issue was currently under discussion, i.e., the definition of a "dwelling," Mr. Degnan noted that he would "object to that *as well.*" A. 96. In other words, having attempted to raise the mutual exclusivity and timing issues, Mr. Degnan was objecting to the instruction on all of the grounds under discussion, not just the People's definition of the term "dwelling." Accordingly, because the defendant made a sufficient good faith effort to articulate the grounds for his

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[18]As the excerpts below reflect, Mr. Degnan had articulated these arguments in his pretrial motions, citing *Gaines*. In a a motion to dismiss the indictment, he had written that

> 6. It is clear that Legislature intended for the author of an accusation, pursuant to a violation of Penal Law 140.25 Burglary in the Second Degree, to elect one method or mode of violation or the other. It can be construed that both cannot be committed simultaneously.
>
> * * *
>
> 11. The wording of the felony complaint alleges both entering and remaining simultaneously, which is a statutory impossibility (see *People v. Gaines*, 147 AD2d 891).

A. 120, 122. And, in a response to a filing by the People, he had included the following language:

> "Primarily, 'in order to be guilty of burglary for unlawfully remaining, a defendant must have entered legally, but remain[ed] for the purpose of committing a crime after authorization . . . In either event, contemporaneous intent is required.'" *People v. Gaines*, 147 AD2d 891, 537 NYS2d 360.

A. 123. _

objection only to be frustrated by the judge, he has preserved the cited instructional error for appellate review.

The Gaines's Instructional Error

In the context of the facts of the instant case, the "unlawful remaining" language should have been excised and the jury instructed that the defendant "was entitled to a charge clearly stating that the jury must find that he intended to commit a crime at the time he entered the premises unlawfully." *Gaines*, 74 NY2d at 363. The defendant Gaines had testified that he had unlawfully entered a building to seek shelter form the cold and had left and taking a jacket and coveralls to keep warm.[19] Defense counsel had requested that the jury be instructed that, where there is an unlawful entry, in order for a burglary to occur the intent to commit a crime within the building must exist at the time of the entry.[20] Thus, "where it was undisputed that defendant's entry was unauthorized -- any reference to 'remains unlawfully' should be

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[19]In the early morning of February 2, 1985, Gaines was arrested as he emerged from the window of a building supply company wearing company clothing. Nothing else was missing from inside the premises. Gaines testified that he had set out to a friend's place from a homeless shelter but, finding no one at home, had sought shelter from the snow and cold. He had pushed in a window and entered the building and supply company for refuge. He claimed that he did not touch any desks, file cabinets or safe but simply put on the jacket and coveralls in order to keep warm. 74 NY2d at 359-361.

[20]Counsel also argued that on the facts of this case -- where it was undisputed that defendant's entry was unauthorized -- any reference to "remains unlawfully" should be omitted from the charge

omitted from the charge." 74 NY2d at 360. The court demurred and charged, without any elaboration, that the jury could find defendant guilty of burglary if, at the time of his knowingly unlawful entry or remaining, defendant intended to commit a crime in the building. During deliberations, the jury asked the court for further instructions on the difference between burglary and trespass, and specifically asked whether "intent has to occur before or after entering the building." The court reread its earlier instructions. Defense counsel again excepted.[21]

The Appellate Division affirmed Gaines's conviction, with two Justices dissenting. The Court of Appeals reversed his burglary conviction, opining that the trial court

> should not have referred to unlawful remaining in its burglary charge, since the situation to which that language applies was not present in the case. Most importantly, defendant was entitled to a charge clearly stating that the jury must find that he intended to commit a crime at the time he entered the premises unlawfully.

374 NY2d at 363. The failure to give the latter instruction compelled reversal because, under the facts in *Gaines* (and those of

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[21]Counsel argued that defendant's commission of a crime as an afterthought following unlawful entry would not transform a trespass and petit larceny into a burglary, and that the jury should be so instructed. In response, the court expressed the view that the Legislature did not intend that a defendant escape prosecution for burglary "in any case where a defendant unlawfully entered a building or premises but not with a specific intent to commit a given crime and thereafter committed * * * a crime in the building." *Id.* at 361.

the instant prosecution), "the jury could have concluded from defendant's testimony that he intended no crime when he broke into the building."[22] *Id.* Moreover, as here as well, "the charge given by the court could have misled the jurors into thinking that any illegal entry constituted a burglary when coupled with a subsequent crime, and it was therefore reversible error." *Id.*

In sum, the trial judge erroneously instructed the jury as to the definition of burglary in the second degree where, under the facts in this record, he had included "remains unlawfully" language and had failed to clearly instruct the jury that it must find that the defendant had intended to commit a crime at the time of his unlawful entry. On this record (*infra* at 31-34), the People's theory of the case posited that the defendant had unlawfully entered 237 Tunnel Road in order to evade the police and had only formed an intent to steal certain items of clothing afterwards. Moreover, the evidence adduced at trial overwhelmingly supported the People's theory of the case.

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[22]Moreover, the jurors had indicated by their specific questions, "that they had focused upon the time defendant's criminal intent was formed, in the correct belief that it should be determinative of whether defendant had committed a trespass or a burglary." *Id.*

II. THE TRIAL JUDGE FAILED TO PROVIDE A MEANINGFUL RESPONSE TO A JURY NOTE SEEKING A CLARIFICATION OF THE TERM "DWELLING" WHERE HE MERELY PROVIDED ILLUSTRATIVE EXAMPLES THAT DUPLICATED THE DICTIONARY DEFINITION, ESSENTIALLY DIRECTING A FINDING

A person commits burglary in the second degree when he or she knowingly enters a building with the intent to commit a crime and where factors tending to increase the likelihood of physical injury are present (see Penal Law 140.25 [1]) or the building is a dwelling (see Penal Law 140.25 [2]). *People v. Barney*, 98 NY2d 367, 370 [2003]. A "dwelling" is statutorily defined as "a building which is usually occupied by person lodging therein at night."[23] Penal Law 140.00 [3][24]. In most cases, this determination "will be a question of fact for the jury based on the particular situation before it." [25] *People v. Quattlebaum*, 91 NY2d 744, 747 [1998] (observing that "there are myriad factual situations in which the question of what constitutes a dwelling can arise.") (citation omitted).

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[23]Second degree burglary includes entering a dwelling, while third degree burglary includes only the entry of a building. See Penal Law 140.20, 140.25 [2]).

[24]See Penal Law 140.00[3] ("'Dwelling' means a building which is usually occupied by a person lodging therein at night.").

[25]See *People v Lewoc*, 101 AD2d 927 [3rd Dep't 1984] [sufficiency of trial court's instruction noting that one month's nonoccupancy did not necessarily cause the building to lose its character as a dwelling was unpreserved and, in any event, whether family's absence was temporary was a jury issue).

The current burglary statute requires only that the building be "usually occupied."[26] See Penal Law 140.00 [3]). Under a "'temporary vacancy doctrine': a dwelling does not lose its character as such merely because its occupant is temporarily absent." *Quattlebaum, id.* at 748 (see, *People v Melendez*, 148 AD2d 964 [4th Dep't 1989]; *Lewoc, supra*). In *Quattlebaum*, the Court of Appeals employed the three-part test of *People v Sheirod*, 124 AD2d 14 [4th Dep't 1987]), the main case that has examined the term "dwelling."[27] *Sheirod* had relied on three factors:

> (1) whether the nature of the structure was such that it was adapted for occupancy at the time of the wrongful entry; (2) the intent of the owner to return;[28] and, (3) whether, on the date of the entry, a person could have occupied the structure overnight.[29]

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[26]Prior to 1967, burglary in the second degree required proof of another person's actual presence in the building wrongfully entered (former Penal Law 403).

[27]In *Sheirod*, a single family home had been left vacant for one year when the family relocated to Colorado on account of a temporary employment assignment.

[28]This Court has cited *Sheirod, id.* at 1718 for the proposition that "[i]f there was an intent to return, the length of absence is generally considered irrelevant." *People v Ferguson*, 285 AD2d 838, 839 [3rd Dep't 2001] (although sorority house was not inhabited at the time of the burglary by reason of college summer break, sorority members intended to return for the fall semester and take up residence.); see also *People v Chandler*, 307 AD2d 585 [3rd Dep't 2003] (owner's son had occupied home for three years while he attended high school in the area and then during his college breaks).

[29]In *Sheirod*, the building satisfied this inquiry in that it was a fully furnished house used as the family residence for 12 to 13 years, utilities remained functioning, the family intended to

Quattlebaum, id. at 748 (citing *Sheirod, id.*, at 17); see also *Barney*, 99 NY2d at 372 (citing "[i]mmediate past use of the building and its lack of abandonment" as other relevant factors to consider in determining whether a building is a dwelling). However, before addressing whether a vacancy is only temporary, a court must first determine that the nature of the structure invites its use as a residence, "to which someone would return, with all its attendant characteristics."[30] *Quattlebaum, id.*

The Initial Jury Charge

During the initial charge conference, over Mr. Degnan's objection, the prosecutor requested a definition of a "dwelling" substantially broader than that of Penal Law 140.00 [3].[31] A. 1725,

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return after the assignment ended in Colorado, and someone could have stayed overnight on the day of the break-in. *Id.*, at 18).

[30]See *Barney, id.* at 370-371 (structure was a one-family residence that was fully furnished with working utilities, decedent's property was still in the house, including food in the refrigerator, and house was ordinarily occupied overnight by decedent before his death.).

[31]The prosecutor had asked the court to instruct the jury that the relevant factors for determining whether a building is a dwelling include

> 1) whether adapted for overnight lodging
>
> 2) . . . but was not occupied on the date of the burglary, whether those who used for overnight lodging intended to return, and if so, when and:
>
> 3) whether on the date of the burglary a person could have occupied the structure overnight"

1735. Judge Burns, who had intended to read the statutory language,[32] chose to retain that wording but to add the following language:

> THE COURT: . . . *You may consider the nature of the structure, that is, its adaptation at the time of the burglary to an occupancy by a person.*
>
> *. . . the intent of the owner to return to the building and whether on the date of the alleged burglary a person could have occupied this structure overnight.*
>
> Thus, you may conclude, if you wish, but are not required to, that the building in question here was a dwelling even though the owner was absent at the time.

A. 105-106 (emphasis supplied).

The Jury Note and Supplemental Instruction

On the first day of jury deliberations, the jury had delivered a note to the trial judge which inquired:

> "Does a dwelling mean the owner would return that night?"

A. 108, 112. During a discussion regarding how to respond to the jury's question, the prosecutor requested that the judge inform the jurors that the definition of dwelling did not require the owner to return that night. He also suggested that the judge reread his

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> A dwelling does not lose its character as a dwelling because it is temporarily unoccupied."

A. 94.

[32]See Penal Law 140.00[3] ("[a] dwelling is a building which is usually occupied by a person lodging therein at night.")

previous definition of dwelling or, alternatively, reread the entire burglary instruction. A. 109.

When the judge then asked Mr. Degnan how he should respond, the defendant requested "a pure reading of the statute."[33] A. 111. The judge demurred, asserting that this would not be "responsive" to the jury's question. *Id.* The judge described the law as "perfectly clear" that a dwelling does not mean that the owner is required to return that night. *Id.* He would instead inform the jurors that there were a "host of factors" that they can consider, which he would consider. *Id.*

When the jury was brought back into court, the trial judge gave the following supplemental instruction:

> The courts have set forth certain standards to help juries determine when a building is a dwelling or not when the building is temporarily empty. The Court has identified as factors relevant to determining whether the absence is temporary, causing the building to be a dwelling or not as follows:
>
> *What is the nature of the structure, its adaptation at the time of the burglary to occupancy by a person? For example, [] is it a house? Is it a tent? Is it an office where people have slept at night because they're having marital difficulties? Is it a car that someone homeless is sleeping it?*
>
> In other words, what is the nature of the structure?

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[33]That statutory language would have benefitted the defendant because Stephen Terry had testified that no one regularly occupied the Tunnel Road structure.

Another court has described this as follows:

> Whether the structure was adapted for overnight lodging and if so, the frequency of its use for the purpose.
>
> Another question that you may consider in determining whether a building is a dwelling is when the owner intends on returning to it *at some point. And if, whether on the date in question, a person could have occupied the structure overnight.*
>
> A dwelling does not lose its character as a dwelling because it is temporarily unoccupied.
>
> So, those are the factors that you consider. And I'll leave my answer at that.

A. 112-113 (emphasis supplied).

The Applicable Procedural Law

A jury may request further instructions at any time during its deliberations and if it does so the court must "give such requested information or instruction as [it] deems proper."[34] CPL 310.30. A trial court, though it enjoys some discretion in framing its supplemental instructions, must respond meaningfully to the jury's

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[34]CPL 310.30 provides, in relevant part, that

> [a]t any time during its deliberation, the jury may request the court for further instruction or information with respect to the law, . . . Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, *must give such requested information or instruction as the court deems proper.* . . ..

(emphasis supplied).

inquiries. *People v. Almodovar*, 62 NY2d 126, 131 [1984] (citing *People v Malloy*, 55 NY2d 296, 301 [1982]; *People v Gonzalez*, 293 NY 259, 262 [1944]); see also *People v. Pyne*, 223 AD2d 910, 912 [1996] (citing *Malloy, supra*). The sufficiency of a trial court's response is gauged by "the form of the jury's question, which may have to be clarified before it can be answered,[35] the particular issue of which inquiry is made, the supplemental instruction actually given and the presence or absence of prejudice to the defendant." *Almodovar*, 62 NY2d at 131-132 (quoting *Malloy*, 55 NY2d at 302).

The supplemental instruction must correctly state the law, must be clear and not confusing, and must be balanced, not showing bias by favoring one side over the other. *People v. Gittens*, 196 AD2d 795 [1st Dept 1993] (defendant denied a fair trial where the supplemental instruction provided was unbalanced in that the court

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[35]In *People v. Miller*, 6 NY2d 152 [1959], where the jurors were confused as to the elements of felony murder and related crimes, and where the defendant's life "depended upon the jury's proper understanding of the elements of each of these crimes,

> it was the court's duty to answer the questions, although they may have been imperfectly phrased. Indeed, the inartistic expression of these questions indicates an incomplete comprehension in the minds of the jury of the elements of the crimes involved. [Moreover,] [i]f the court did not understand the meaning of the questions, it was obliged to direct further inquiries to the jury to ascertain their difficulties.").

6 NY2d at 156 (citation omitted).

instructed the jury on whether the acts of the officer were justified but did not again instruct them as to the reasonableness of the defendant's actions); *People v. Jones*, 216 AD2d 324, 325 [2d Dept 1995] (hypotheticals provided by the court during its supplemental instruction were so unbalanced that they effectively instructed the jury to infer that the defendant intended to sell the narcotics which were in his possession.).

The judge's supplemental instruction informed the jurors that they should consider "the nature of the structure, its adaptation at the time of the burglary to occupancy by a person," reiterating the first *Sheirod* factor. However, the examples that he cited [a house, a tent, an office or a car], were both tautological and biased towards the prosecution. The word "dwelling" is defined in the dictionary as "a shelter (such as a *house*) in which people live"[36] or "[a] *house*, flat, or other place of residence."[37] Moreover, Detective Harder had described at 237 Tunnel Road as a "single-family residence." As a result, by using the words "house" and "residence" as examples of a "dwelling", Judge Burns was, in effect, improperly making a judicial finding and usurping the jury's role.

The judge also misstated the statutory definition by inviting

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[36]https://www.merriam-webster.com/dictionary/dwelling (site visited May 18, 2018).

[37]https://www.google.com/search?q=dwelling+oxford+dictionary&ie=utf-8&oe=utf-8&client=firefox-b-1 (site visited May 16, 2018).

the jurors to consider "whether the structure was adapted for overnight lodging and if so, *the frequency of its use for the purpose.*" A. 113 (emphasis supplied). The judge offered jurors no guidance as to how often the building must be used for overnight lodging and omitted the requirement it must be"usually" used for that purpose. PL 140.00[3]. This language ignored Mr. Degnan's request that the court read the statutory language to the jurors and also undermined the testimony of Mr. Terry that the building was not regularly occupied.

Finally, the judge's supplemental instruction was confusing, as the language below reflects:

> Another question that you may consider in determining whether a building is a dwelling is when the owner intends on returning to it *at some point*. And if, whether *on the date in question*, a person could have occupied the structure overnight.

A. 113. Unlike the language of the initial instruction, the supplemental instruction does not refer to the "date of the alleged burglary" but refers vaguely to "the date in question."[38] On this record, Mr. Terry had testified that his mother had returned to Tunnel Road in the fall of 2013 at a time when her personal property was being removed to a new location in anticipation of selling 237 Tunnel Road. Thus, while she had intended to return

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[38]The judge presumably intended that "the date in question" should refer to the date of the alleged burglary. However, this phrase could also refer to the owner had intended to return to the property.

"at some point," she no longer had intended to reside there. Moreover, on that date, whether a person could have occupied the structure overnight would depend on how much of its contents had been removed.

In sum, because the Judge Burn's supplemental instruction directed a finding as to the definition of a "dwelling," thereby usurping the jury's factfinding role, and was also both confusing and unintelligible, the judge failed to respond meaningfully to the jury's inquiry about the meaning of the term "dwelling." *Almodovar*, 62 NY2d at 131.

III. WHERE THE PEOPLE'S THEORY OF THE CASE PROPOSED THAT THE DEFENDANT HAD ILLEGALLY ENTERED 237 TUNNEL ROAD AFTER THE ALLEGED SEXUAL ASSAULT IN ORDER TO EVADE THE POLICE, AND ONLY THEREAFTER FORMED AN INTENT TO STEAL CERTAIN ITEMS OF CLOTHING, THE PEOPLE FAILED TO ADDUCE SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF BURGLARY IN THE SECOND DEGREE

Mr. Degnan avers that, at least where the People have expressly adopted a theory of the case that posits that the defendant unlawfully entered a structure for the purpose of evading the police after having committed a sexual assault, and only formed an intent to steal certain items of clothing during his period of sequestration, and the weight of the evidence supports this theory, the People have failed to adduce sufficient evidence to convict the defendant of burglary in the second degree, but merely a criminal trespass.

Standard of Review

The New York court system permits two standards of intermediate appellate review -- legal sufficiency and weight of evidence. *People v Bleakley*, 69 NY2d 490, 495-496 [1987]. Although each legal standard is related, each requires a discrete analysis. 69 NY2d at 495. Whether a conviction is supported by sufficient evidence is a legal, not a factual, determination. "Where [] the defendant contends that his conviction is not supported by legally sufficient evidence, [the court] review[s] the evidence in a light most favorable to the People, and will not disturb a conviction as long as there exists 'any valid line of

reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial.'" *People v Galindo*, 23 NY3d 719, 724 [2014] [quoting *Bleakley, id.); People v Robinson*, 156 AD3d 1123, 1124-25 [3rd Dep't 2017]) (citations omitted).

However, in this state, the appellate court's dispositive analysis is not limited to that particular test, as the court must also address whether a verdict is supported by the weight of the evidence.[39] *People v Acosta*, 80 NY2d 665, 672 [1993] (citing *Bleakley*, 69 NY2d at 495; CPL 470.15[5]); *Robinson*, 156 A.D.3d *at* 1128]). The court must first assess whether, "based on all the credible evidence a different finding would not have been unreasonable." *Bleakley, id.* If so, then "the appellate court must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony.'" *Id.* (citations omitted). If it appears that the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict. *Id.* (citing CPL 470.20 [2]).

The felony of second degree burglary occurs when a person "knowingly enters or remains unlawfully in a [dwelling] with intent

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[39]*Bleakley*, 69 NY2d at 495 ("Even if all the elements and necessary findings are supported by some credible evidence, the court must examine the evidence further.").

to commit a crime therein." *Cubino, supra* at 12 (quoting Penal Law 140.20.). "[I]ntent is subjective, and must be established by proof of defendant's conduct and other facts and circumstances." *People v Mackey*, 49 NY2d 274, 276 [1980]. Courts have inferred an intent to commit a crime from "the circumstances of the entry, from defendant's unexplained or unauthorized presence on the premises and from defendant's actions and assertions when confronted by the police or the owner." *Mackey*, 49 NY3d at 280(intent to commit a crime on entering the building 'could be inferred beyond a reasonable doubt from the circumstances of the breaking'") (quoting *People v Gilligan*, 42 NY2d 969 [1977]); see also *People v Terry*, 43 AD2d 875 [1974] (intent necessary for burglary can be inferred from the circumstances of the entry itself).

However, Penal Law 140.20 "requires that intent to commit a crime in the building *exist at the time of the unlawful entry* . . . ."[40] *Id.* (emphasis supplied.). "Although the People need not

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[40]After analyzing the legislative history of Penal Law 140.20, the Court of Appeals summarized its holding as follows:

> [i]n order to be guilty of burglary for unlawful remaining, a defendant must have entered legally, but remain for the purpose of committing a crime after authorization to be on the premises terminates. And in order to be guilty of burglary for unlawful entry, a defendant must have had the intent to commit a crime at the time of entry. In either event, *contemporaneous intent is required.*

Gaines, 74 NY2d at 363 [emphasis supplied).

specify what crime a defendant intended to commit,[41] in order to elevate criminal trespass to a burglary, *the proof must show a defendant intended to commit some other crime contemporaneous with the trespass." Cubino*, 50 AD3d at 312 (citing *People v Mahboubian*, 74 NY2d 174, 193 [1989]).

Even assuming arguendo that, viewing the evidence in a light most favorable to the People, there might exist 'any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial," the verdict was clearly against the weight of the evidence. This follows, both because the People's theory of the case expressly identified the defendant's motive for unlawfully entering 237 Tunnel Road, to hide out in order to evade capture by the police, but also because the evidence adduced at trial clearly supported the People's theory.

The People's theory of the case set forth that the defendant had unlawfully entered the dwelling at 237 Tunnel Road in order to evade apprehension by the police. Moreover, the People relied on this theory in order to join Counts 1 thru 7 with Counts 8 thru 15, pursuant to CPL 220.20[2]. Thus, in opposing the defendant's motion to sever the two groups of counts, the People's affirmation averred that

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[41]See *Gaines*, 74 NY2d at 362 n.1 ("This is not to suggest, however, that the People are required to prove that defendant intended to commit any particular crime within a building.").

> . . . the defendant committed the sexual assaults and endangering the welfare of a child on June 9, 2013. His conduct after that, including *the burglary and grand larcenies that were committed between June 9, 2013 and June 16, 2013, were during the time he was on the run for the June 9, 2013 charges*. The defendant's actions following the sexual assaults, was *a conscious attempt on the part of the defendant to evade arrest and included breaking into a residence, stealing clothing,* attempting to hotwire a motorcycle in the basement, stealing two trucks from a separate residence, are absolutely relevant to the issue of defendant's consciousness of guilt in relation to the sexual assaults.

A. 124 (emphasis supplied). In his January 29, 2016 order, the trial judge rejected the defendant's pretrial joinder challenge, adopting People's legal argument. A. 118. Under that rationale,

> the alleged burglary and grand larcenies committed between June 9, 2013 and June 16, 2013 demonstrate a conscious attempt on the part of the defendant *to evade arrest and to flee having allegedly committed sexual assault on June 9, 2013* . . . [As such] the defendant's efforts to flee are relevant because they demonstrate a consciousness of guilt.

Id. (emphasis supplied).

Under the People's theory, the defendant had sought shelter and refuge at the 237 Tunnel Road residence, where he had stayed for as long as one week, from June 9th to June 16h, 2013. Moreover, at trial, Stephen Terry's testimony was consistent with this theory that the defendant had broken into

the dwelling in order to evade the police and had stayed at that location for several days.[42] Finally, during his summation the prosecutor argued this same theory to the jurors, averring that

> . . . He was staying there at night. We know that he had no permission or authority to enter or stay there.
>
> I'm asking you to consider whether *he formed the intent to steal once in that unlawful dwelling and remaining and then stole that clothing*, the infamous tan T-shirt, the "Miramar" shirt, the "Top-Gun" shirt, the black "Stadium International" shirt.
>
> * * *
>
> . . . *even if he entered the house, and then remaining in the house, decided to take some items from that house . . . it's a burglary, second degree because it's a dwelling.* He was staying there at night. No permission or authority to enter or stay
>
> . . . the infamous tan T-shirt, the "Miramar" shirt, the "Top-Gun" shirt, the black "Stadium International" shirt.

A. 102-104.

In sum, the People's theory of the case, which was supported by the evidence adduced at trial, asserted that the defendant had

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[42]Terry testified that, when he had inspected the home on June 16th, he had found dishes in the kitchen sink, which he had been recently soiled, and a bowl of food in the refrigerator. A. 68-69. He had observed a "laid out" sleeping bag on her bed and clothes on the floor outside of a hallway closet. *Id.* He also noticed hair spray or mouth wash on her dresser. A. 70. Finally, when he had walked through the living room he observed a coffee mug with a protruding tea bag on a table. *Id.*

unlawfully broken into 237 Tunnel Road, not because he had intended to commit a larceny at that point, but to use that residence as a hide-out. This theory allowed the People to join the sex abuse counts (1-7) with the larceny counts (8-15), under the theory that evidence of evasion reflected a consciousness of guilt stemming from the June 9th incident.

Under the People's theory, a suspect wishing to abscond from law enforcement and to use an unoccupied home as a temporary hide-out might do so in order to feed himself, use the utilities, and sleep in a bed. Under these circumstances, the defendant might have been charged with burglary in the second degree under a theory that he had entered in order to evade the police but had also harbored a contemporaneous intent to make use of the available facilities. However, it would be mere speculation to assume that a burglar would break into a home with a contemporaneous intent to take items of clothing, particularly T-shirts, absent some compelling need. See Gaines, 74 NY2d at 359-361 (defendant who had sought shelter from the cold and snow in a building had taken a jacket and overalls in order to keep warm).

Accordingly, the evidence adduced by the People at Mr. Degnan's trial was insufficient to establish the intent to commit a crime in order to support a conviction for burglary in the second degree. "Although the People need not specify what crime a defendant intended to commit, in order to elevate criminal trespass to a burglary, the proof must show a defendant intended to commit

some other crime contemporaneous with the trespass." *Cubino*, 50 AD3d at 312 (citing *Mahboubian*, 74 NY2d at 193). In reversing a burglary conviction in *Cubino*, the Court of Appeals concluded that the People's evidence "clearly established that when defendant entered the basement at issue his intent was to find a hiding place after having committed one of the other two burglaries at a nearby building."[43] *Id.* at 312-13. The Court reversed the defendant's burglary conviction, concluding that there was

> no evidence that he intended to commit any other crime in the building at issue, and passively hiding from police is not a crime under these circumstances.

Id.

In sum, because the People's theory of the case posited that the defendant had entered the residence at 237 Tunnel Road for the purpose of evading the police, and had formed an intent to steal certain items of clothing only after remaining in the residence, and the weight of the evidence supported this theory, the People failed to adduce sufficient evidence to convict Mr. Degnan of burglary in the second degree, having proven only the lesser offense of criminal trespass.

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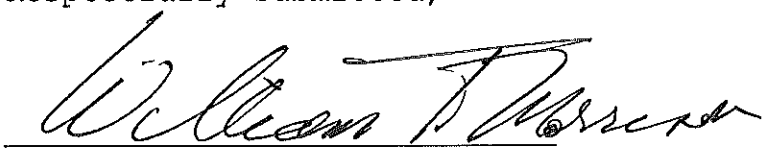
[43]The Court noted that the Defendant "was apprehended as he sat hiding behind a door in that basement." *Id.* at 313.

CONCLUSION

WHEREFORE, for the reasons set forth above, this Court should vacate Mr. Degnan's conviction of burglary in the second degree and remit his case to the Broome County Court for resentencing as a second violent felony offender.

Respectfully submitted,



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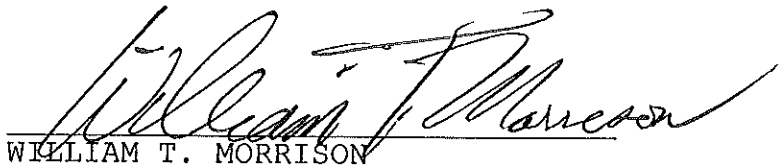
CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury, that a copy of the foregoing Brief for Appellant and Appendix has been mailed, postage prepaid, to Hon. Stephen K. Cornwell, Jr., Broome County District Attorney, 45 Hawley Street, Binghamton, New York 13902 and to Mr. Michael Degnan, 16-B-0986, Attica Correctional Facility, 639 Exchange Street, Attica, New York 14011-0149 this ___ day of May, 2018.



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